STATE OF CALIFORNIA GRAY DAVIS, *Governor*

PUBLIC UTILITIES COMMISSION
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3298

October 24, 2002

TO: PARTIES OF RECORD IN CASE 01-08-022
DECISION 02-10-036, MAILED October 24, 2002

On September 19, 2002, a Presiding Officer's Decision in this proceeding was mailed to all parties. Public Utilities Code Section 1701.2 and Rule 8.2 of the Commission's Rules of Practice and Procedure provide that the Presiding Officer's Decision becomes the decision of the Commission 30 days after its mailing unless an appeal to the Commission or a request for review has been filed.

No timely appeals to the Commission or requests for review have been filed. Therefore, the Presiding Officer's Decision is now the decision of the Commission.

The decision number is shown above.

/s/ CAROL A. BROWN
Carol A. Brown, Interim Chief
Administrative Law Judge

CAB:jyc

Attachment

**Mailed 10/24/2002**

Decision 02-10-036 October 24, 2002

**BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA**

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| Jeffrey A. Heyser,<br><br>Complainant,<br><br>vs.<br><br>AT&T Communications of California, Inc.,<br><br>Defendant. | Case 01-08-022<br>(Filed August 14, 2001) |

Jeffrey A. Heyser, representing himself, complainant.
Darlene M.Clark, Attorney at Law, for AT&T Communications of California, Inc., defendant.

## OPINION RESOLVING COMPLAINT

### Summary

In today's decision, we find that AT&T Communications of California, Inc. (AT&T) did not violate its tariffs by discontinuing Complainant's enrollment in the One-Rate Calling Card Plan when he changed long distance carriers, by then permitting Complainant to continue the One-Rate Plan under the direct-billed option at his request, and by re-rating usage charged at the standard tariffed calling card rates during the period between discontinuance and re-enrollment. We note, however, that Complainant got what was required under AT&T's tariff only after filing informal and formal complaints. The practice of resolving consumer concerns only after the filing of informal and formal complaints does

not reflect a good faith effort on AT&T's part to fairly address those concerns. We will require AT&T to file a compliance report with the Director of the Telecommunications Division that confirms that AT&T is interpreting its One-Rate Calling Card Plan tariff in conformance with this opinion.

## Procedural Background

We held two prehearing conferences, on November 26, 2001, and February 4, 2002, to establish the scope of this proceeding. At the direction of the assigned Administrative Law Judge (ALJ), AT&T submitted its intrastate tariff sheets in effect on October 23, 2000, which cover the One-Rate Calling Card Plan. AT&T filed a motion to dismiss this complaint, which was denied by Assigned Commissioner Ruling on February 25, 2002.

An evidentiary hearing was held in Sacramento on March 27, 2002. Complainant testified on his own behalf, and AT&T presented one witness, Teresa Ono. Opening and reply briefs were filed on May 6 and 24, 2002, respectively. By ALJ ruling, Complainant's motion to set aside submission was denied, the related pleadings were received as supplemental briefing, and this proceeding was deemed submitted on June 27, 2002.

## Factual Background

The parties stipulated to the following facts:

1. Prior to about October 23, 2000, Complainant subscribed to AT&T's long distance service and One-Rate Calling Card Plan.

2. On or about October 23, 2000, Complainant changed his long distance presubscription from AT&T to another carrier.

3. The tariffed rates for AT&T's One-Rate Calling Card Plan at the time Complainant changed presubscription were a $1.00 per month recurring charge, usage at $0.25 per minute, plus applicable taxes and surcharges.

4. AT&T discontinued Complainant's enrollment in the One-Rate Calling Card Plan as of October 23, 2000, upon notification by Pacific Bell to AT&T of Complainant's change in presubscription.

5. The standard tariffed rates for intrastate calls at the time Complainant changed presubscription were $0.69 per minute, a $1.25 set-up charge per call, plus applicable taxes and surcharges.

6. Complainant did not notify or contact AT&T, on or about October 23, 2000, regarding his change in presubscribed long distance carrier or his intentions regarding his calling card and his enrollment in the One-Rate Plan.

7. On or about August 31, 2001, Complainant spoke with a customer service representative and received a $70 credit.

The record also reflects that Complainant established a direct-billed account for the One-Rate Plan when he realized that AT&T had changed his calling card rates. For One-Rate calling card customers who change long distance carriers and continue to use their calling card, AT&T's policy since August 2001 has been to notify the customers of their options on their first bill after that calling card usage. A negligible number of customers who retain their AT&T calling card after changing from AT&T long distance select the One-Rate-Plan. Almost all customers who retain the calling card choose to pay standard tariffed rates.[1]

## Parties' Contentions

Complainant alleges that AT&T increased the rate for his One-Rate Calling Card Plan after he discontinued his AT&T long distance service. At

[1] The number of customers who subscribe to the direct-billed One-Rate Calling Card Plan, and the number who use standard tariffed rates, are proprietary.

Complainant's request, AT&T reinstated his calling card service and billing rate, but refused to adjust the old charges.

Complainant alleges AT&T violated its tariff by selectively disconnecting customers who were billed through their local exchange carrier and not disconnecting customers who had direct-billed accounts. Complainant further alleges that AT&T violated its tariffs by charging the standard tariffed rate to customers who changed long distance carrier, but continued to use their calling cards, and by failing to deactivate the calling card. Finally, Complainant alleges AT&T violated its tariff by providing the One-Rate Plan to subscribers who were not geographically located in the serving area of one of the local exchange carriers listed in the tariff.

In his testimony, Complainant withdrew his allegation that AT&T improperly terminated the One-Rate Plan when Complainant changed long distance carriers. He concedes that AT&T's tariff requires such termination.

AT&T contends it complied with its tariffs when it discontinued Complainant's One-Rate Plan and charged Complainant its standard tariffed calling card rates when Complainant changed his primary long distance carrier. Regarding Complainant's contentions that direct-billed customers are treated differently and that AT&T failed to update its tariff to include additional geographic areas where the One-Rate Plan is offered, AT&T objects that these contentions are outside the scope of the proceeding, as set forth in the scoping memo. As to the merits of the latter contentions, AT&T states that direct-billed accounts are not tied to presubscription to long distance service and that customers who sign up for a direct-billed calling card under the Plan consent to be treated differently. AT&T says the tariff properly alerts customers that the Plan is not available in all geographic areas, but will become available in other areas as billing becomes available.

## Discussion

After hearing, the issues identified in the scoping memo that remain in contention are:

1. Whether AT&T violated its intrastate tariffs when it discontinued Complainant's enrollment in the One-Rate Calling Card Plan and charged Complainant higher rates after Complainant switched to another interexchange service provider; and

2. What sanctions and/or other relief should be ordered if a violation is found.

### 1. Legal Standard

The parties dispute whether the filed rate doctrine applies to this complaint. AT&T avers it does, and Complainant disagrees, in reliance on *Ting v. AT&T* (N.D. Cal. 2002) 182 F. Supp.2d 902. The filed rate doctrine states that the relationship between a utility and the user of a service is governed by the tariff the utility has filed with the appropriate administrative agency (regulatory authority). This relationship is in the first instance contractual, but the tariff is incorporated into the contract between the utility and its customer. (*Sherwood v. County of Los Angeles* (1962) 203 Cal.App.2d 354, 359; *Gardner v. Basich Bros. Constr. Co.* (1955) 44 Cal.2d 191, 193-194.) The tariff clearly regulates the terms of service, e.g., price (*Gardner*).

In the wake of the Telecommunications Act of 1996, the Federal Communications Commission (FCC) "detariffed" interstate telecommunications.[2] This means that the relationship between an interstate telecommunications provider and its customers is purely contractual. Any

[2] Mandatory detariffing in interstate telecommunications became effective on August 1, 2001. (*Ting*, 182 F.Supp.2d at 909.)

limitation of liability must be part of the contract. A detailed history of the detariffing procedures as they impacted the liability of interstate telecommunications carriers is given in *Ting, supra.* The changes to the federal regulatory scheme do not affect the schemes of the states, however, nor do they affect liabilities accruing before the effective date of detariffing. Congress intended to abolish the filed rate doctrine and to subject interstate telecommunications carriers to the same state consumer protection laws that govern unregulated businesses. (*Id.* at 908.) Some tariffs survived, and where they survive, they still govern. (*Id.* at 909-910.)

We have not detariffed AT&T's services and the issue here, as stated in the scoping memo, is whether AT&T violated its intrastate tariffs when it discontinued Complainant's One-Rate Plan and charged him higher standard tariffed calling card rates.

In interpreting tariffs, the Commission has held that the tariff language must be construed as a whole, and should be given a fair and reasonable construction that avoids absurd results or would render some part of the tariff a nullity. (*See* D.98-12-086, 1998 Cal. PUC LEXIS 1014, **19-20.)

### 2. AT&T Adhered to Its Tariffs By Permitting Complainant to Continue in the One-Rate Plan Under the Direct-Billed Option and By Re-Rating Charges at the Standard Tariffed Rate

Under Pub. Util. Code § 1702, Complainant must prove by a preponderance of evidence that AT&T has violated a specific provision of a tariff approved by the Commission. We find that AT&T did not violate its tariffs by discontinuing Complainant's enrollment in the One-Rate Calling Card Plan when he changed long distance carriers, by then permitting Complainant to continue the One-Rate Plan under the direct-billed option at his request, and by

re-rating usage charged at the standard tariffed calling card rates during the period between discontinuance and re-enrollment.

The One-Rate Calling Card Plan tariff[3] provides:

> Enrollment in this plan may be discontinued by the Customer upon written or verbal notice to AT&T. In addition, AT&T will discontinue a Customer's subscription to the plan (unless the Customer provides written or verbal notice to the contrary) when AT&T is notified that the Customer has changed their primary interexchange carrier to a carrier other than AT&T after the Customer subscribed to this plan. Discontinuance will be effective as of the date the Customer changed their primary interexchange carrier.

The tariff language clearly permits a customer to notify AT&T that the customer does not want AT&T to discontinue the One-Rate Plan when the customer changes long distance carriers. At the time AT&T discontinued Complainant's subscription to the One-Rate Plan, the onus fell on the customer to request that the Plan be continued. Complainant made that request (albeit sometime <u>after</u> changing his long distance carrier), and AT&T enrolled him in the One-Rate Calling Card Plan under the direct-billed option. Although Complainant requested that AT&T adjust the charges billed at the higher standard tariffed rate, AT&T did not immediately do so. However, AT&T eventually re-rated the calls, and all of Complainant's calling card usage was billed under the One-Rate Plan. Thus, AT&T conformed to its tariffs in permitting Complainant to re-enroll in the One-Rate Plan and by adjusting Complainant's bill, but Complainant got what was required under the tariff only after filing informal and formal complaints. The practice of resolving consumer concerns only after the filing of informal and formal complaints does not reflect a

[3] Schedule Cal. PUC No. A6, Message Telecommunication Service, Section 6.3.8 incorporates by reference FCC Tariff No. 27, Section 4.2.20.C.

good faith effort on AT&T's part to fairly address those concerns. A pattern of tardy and forced resolution of consumer concerns would call into question the adequacy of AT&T's consumer complaint procedures.

### 3. AT&T Shall File a Compliance Report

We limited the scope of this proceeding to Complainant's allegation that AT&T violated its tariff in discontinuing his One-Rate Plan and charging him higher rates. Because AT&T permitted Complainant to re-enroll in the One-Rate Plan and re-rated the calling card calls charged at the standard tariffed rate, AT&T did not violate its tariffs. Although we do not find at this time that we need order further proceedings, we will require AT&T to file a compliance report that confirms it is operating in conformance with our interpretation of its One-Rate Calling Card Plan tariff.

Under AT&T's current policy, adopted after Complainant changed long distance carriers, One-Rate Plan subscribers who continue to use their AT&T calling card after changing long distance carriers are charged standard tariffed rates until they are notified of their options. AT&T has chosen this notification process because it has determined that very few of the One-Rate Plan subscribers who change their long distance service to another carrier elect to remain on the plan if they enroll in the direct-billed calling card option. Charging standard tariffed calling card rates for the customers who prefer the direct-billed option under those rates, the overwhelming majority of customers, is consistent with AT&T's tariff.

Offering customers who change their long distance carrier the option of choosing the One-Rate Plan <u>after</u> they use their card similarly is consistent with AT&T's tariff. However, a customer probably would not know that he or she was being charged the standard tariffed rates until that first bill is received. The tariff permits a subscriber to make arrangements other than automatic

discontinuance when the subscriber changes long distance carriers. The tariff does not state when the subscriber must request that the Plan continue. Since the tariff states no specific timeframe for providing written or verbal notice that the subscriber does not want to discontinue the Plan, it is sufficient for the subscriber to request that the Plan continue at the time the subscriber receives the bill or notice.

If the subscriber requests that the Plan continue, the subscriber has provided notice that he or she does not want the Plan to be discontinued; AT&T must then reinstate the Plan and adjust the charges it had billed at the higher standard tariffed rate. Although the notice procedure is administratively convenient for AT&T, AT&T cannot escape its obligation under the tariff to permit One-Rate Plan subscribers to elect to continue the Plan.

The record is inconclusive as to whether AT&T re-rates charges when customers elect to continue under the One-Rate Plan, although AT&T initially declined to do so for Complainant. Adjustment of charges is consistent with the tariff. Denying those adjustments is not.

Further proceedings do not appear necessary, given AT&T's change in policy around the time Complainant filed this complaint and the small number of customers who elect to continue with the One-Rate Calling Card Plan after they change long distance carriers. However, we will require AT&T to file a compliance report to confirm that AT&T is interpreting its One-Rate Calling Card Plan tariff in conformance with this opinion.

We need not address Complainant's additional allegations of tariff violations. By requiring AT&T to submit a compliance report that confirms it is interpreting its One-Rate Plan tariff in conformance with this opinion, we ensure there is no discrimination among classes of customers. Further, Complainant does not allege that AT&T permitted him to enroll in the Plan in a service

territory that is not part of AT&T's tariff. We concur with AT&T that the allegations concerning geographic coverage are outside the scope of this proceeding.[4]

## Findings of Fact

1. Prior to about October 23, 2000, Complainant subscribed to AT&T's long distance service and One-Rate Calling Card Plan.

2. AT&T discontinued Complainant's enrollment in the One-Rate Calling Card Plan as of October 23, 2000, upon notification by Pacific Bell to AT&T of Complainant's change in presubscription.

3. Complainant did not notify or contact AT&T, on or about October 23, 2000, regarding his change in presubscribed long distance carrier or his intentions regarding his calling card and his enrollment in the One-Rate Calling Card Plan.

4. Complainant established a direct-billed account for the One-Rate Plan when he realized that AT&T had changed his calling card rates.

5. On or about August 31, 2001, Complainant spoke with a customer service representative and received a $70 credit.

## Conclusions of Law

1. In interpreting tariffs, the tariff language must be construed as a whole and should be given a fair and reasonable construction that avoids absurd results or would render some part of the tariff a nullity.

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[4] Although this proceeding did not entertain any allegations concerning the geographic territory in which the Plan is offered, it does not appear from the record that AT&T is violating its tariff by offering the Plan in several small local exchange carriers' service territories when those territories are not listed in the tariff. The tariff appears to cover that scenario by stating the Plan will be offered in other service territories as they become available.

2. Schedule Cal. PUC No. A6, Message Telecommunication Service, Section 6.3.8 (incorporating F.C.C. Tariff No. 27, Section 4.2.20.C) permits AT&T to discontinue enrollment in the One-Rate Calling Card Plan when customers change long distance carriers, and permits customers to continue the One-Rate Plan at the rates in effect under the Plan.

3. AT&T has resolved Complainant's allegations consistent with its tariff.

4. It is reasonable to require AT&T to submit a compliance report confirming that AT&T is interpreting its One-Rate Calling Card Plan tariff in conformance with this opinion.

5. It is reasonable to make this order effective today in order to ensure AT&T is operating consistent with its approved tariffs.

## O R D E R

**IT IS ORDERED** that:

1. The complaint of Jeffrey A. Heyser is granted insofar as it requests that AT&T Communications of California Inc. (AT&T) permit One-Rate Calling Card Plan customers who change their primary interexchange carrier to continue their subscription to that Plan, as set forth in this opinion. The complaint is otherwise denied.

2. AT&T shall, within 30 days of the effective date of this decision, file with the Director of the Telecommunications Division a compliance report that confirms that AT&T is interpreting its One-Rate Calling Card Plan tariff in conformance with this opinion.

3. This proceeding is closed upon receipt of AT&T's compliance report.

This order is effective today.

Dated October 24, 2002, at San Francisco, California.